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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 470

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and GEORGE LEONIDAS,
Petitioners,

vs.

NATIONAL MEDIATION BOARD and LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board, HOWARD G. GAMSER and FRANCIS A. O'NEILL, JR., Individually and as Members of the National Mediation Board, and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

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To the United States Court of Appeals for the District of Columbia Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 31, 1966. The order of the United States District Court for the District of Columbia granting respondents' motion for summary judgment and denying petitioners' motion for summary judgment is printed in R. 217. The opinion of the court below is printed in Appendix A, *infra*, page 17 of this Petition.

JURISDICTION.

The Opinion of the court below was entered May 31, 1966 and judgment was entered on the same day. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

In an election conducted by the National Mediation Board, in which more than 35,000 employees of a single employer were entitled to choose between petitioner union and another labor organization as their collective bargaining representative, did the Board deprive petitioners of their rights of freedom of speech and assembly and due process of law guaranteed by the First and Fifth Amendments to the Constitution by denying to petitioner union sufficient time and opportunity to communicate effectively with the employees entitled to vote in the election?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The provisions of the United States Constitution which are involved are the First and Fifth Amendments. The statutory provisions involved are Section 2, Fourth of the Railway Labor Act as amended. 45 U. S. C., § 152, and Section 2, Ninth of the Railway Labor Act, as amended, 45 U. S. C., § 152. These provisions are printed in Appendix B, page 20 of this Petition.

STATEMENT.

A. Facts.

Since approximately 1915 petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an international labor organization, hereinafter referred to as "IBT", has represented,

for the purposes of collective bargaining, drivers, helpers and garagemen employed by the Railway Express Agency, Inc., hereinafter referred to as "REA", in eight major cities in the United States; namely, Cincinnati, Ohio; Cleveland, Ohio; Newark, New Jersey; New York, New York; Philadelphia, Pennsylvania; St. Louis, Missouri; San Francisco, California and Chicago, Illinois. For a similar period of time, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, an international labor organization, hereinafter referred to as "BRC", intervenor-respondent herein, has represented all other employees of REA in the United States with the exception of one group of approximately 650 employees which is not involved in the instant case. As of early 1965 approximately 3200 employees of REA were represented by, and held membership in the IBT (R. 6-7, 147-148), while the BRC represented approximately 32,000 such employees (R. 82-83, 135, 148).

The right to represent various categories of employees of REA had been a subject of considerable controversy between the IBT and BRC during the early years of their status as bargaining representatives of employees of REA. However, in the early part of 1937 the disagreements between the IBT and the BRC over their jurisdictional rights of representation at REA were submitted to the respondent National Mediation Board, pursuant to Section 5, First, of the Railway Labor Act, 45 U. S. C. § 155, First. As a result of the Board's conciliation efforts, on June 10, 1937, the IBT, BRC, and REA entered into a formal agreement which resolved the disputes and settled the respective jurisdictional claims of the two unions (R. 7-8, 44-46, 83).

Basically, the mediation agreement provided that the IBT would represent the following employees:

> Chauffeurs and helpers, stablemen and garagemen who are now represented by the International

> Brotherhood of Teamsters, Chauffeurs, Stablemen[1] and Helpers of America in the following cities: Cincinnati, Ohio; Cleveland, Ohio; Newark, N. J.; New York, N. Y.; Philadelphia, Pa.; St. Louis, Mo.; San Francisco, Calif.; Chicago, Ill.; and in any other city in which a majority of chauffeurs and helpers, stablemen and garagemen may hold membership in the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America.

The agreement provided further that the BRC would represent all other employees of REA with a few additional exceptions (R. 8, 18-20, 83-84, 135, 148-149). The mediation agreement was incorporated as an express provision in the respective collective bargaining agreements negotiated by the IBT and REA and by the BRC and REA, and has remained a part of such agreements until the present (R. 8-9, 84, 135, 149-150).

On March 23, 1965, notwithstanding the existence of the mediation agreement, the BRC filed an application with the National Mediation Board, pursuant to Section 2, Ninth, of the Railway Labor Act, 45 U. S. C., § 152, Ninth, requesting certification of the BRC as the representative of a craft or class of clerical, office, station and storehouse employees, consisting of all employees of REA, including the 3200 employees represented by the IBT at the time of the filing of the application. The BRC application was docketed by the Board as Case No. R-3750 (R. 9-10, 21-29, 86, 135-136, 140, 151).

Subsequent to the filing of the BRC's application, the IBT raised various objections before the Board to the processing of the application, including the existence of the mediation agreement of 1937 as a bar to the filing of the BRC application (R. 11, 34, 40, 67), the forty year

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[1] On September 12, 1940, the designation "Stablemen" in the title of the IBT was changed to "Warehousemen."

history of bargaining as establishing two separate classes of employees appropriate for collective bargaining at REA (R. 33, 40, 57-65), as well as the desire of the employees of REA represented by the IBT to continue to be represented by the IBT as a separate craft or class (R. 10). In the alternative, the IBT contended that if the Board were to direct an election on a system-wide basis it should be limited to a craft or class of chauffeurs, helpers and garagemen, rather than the unit sought by the BRC (R. 39-40).

On September 8, 1965, the Mediation Board issued its "Findings Upon Investigation" in which it rejected all IBT contentions, established a single company-wide craft or class of "Clerical, Office, Station and Storehouse Employees of REA Express, Inc." and directed an election among all these employees. However, no specific date was announced by the Board for the conduct of the election at that time (R. 12, 30-72, 87-88, 136, 141-142, 151).

On September 24, 1965, the IBT filed a motion with the Mediation Board requesting that following receipt from the Board of a list containing the names and addresses of the employees eligible to vote in the election, the parties be permitted a minimum of ninety days prior to the date on which the election would be held in which to campaign among the employees and engage in electioneering activities. The IBT's motion was denied by the Board on October 8, 1965 (R. 13, 72-73, 142, 152, 208-209).

On or about October 8, 1965, a representative of the Mediation Board informed the parties that the election would be held no later than November 4, 1965, and perhaps sooner. A representative of the Board also informed the parties that on or about October 15, 1965, in accordance with the past established practice of the Board, the parties would be supplied with a list containing the names and addresses of the employees eligible to participate in the election (R. 151-152, 159-160).

On Friday, October 15, 1965, the Board, through its mediator, William H. Pierce, delivered to the parties a list of approximately 34,000 names and addresses of purportedly eligible employees of REA, which previously had been supplied to the Board by REA. The list purportedly included the names and addresses of all eligible REA employees who were employed at the company's approximately 8,000 places of business throughout the United States. In addition, the list purportedly included the names and addresses of approximately 4,000 employees who were on furlough or on disability retirement, but who, pursuant to the Board's rules and regulations, were eligible to participate in the election. Members of the latter group were not working at any of the company's places of business at the time of the election (R. 143, 152, 159-160).

On October 22, 1965, Mediator Pierce advised the IBT that the names and addresses of approximately 900 eligible employees had been omitted from the original list and he made these previously omitted names and addresses available to the IBT on that date (R. 153, 161).

On approximately October 19, 1965, the IBT began to mail campaign literature to employees of REA on the basis of the addresses it had been supplied by Mediator Pierce on October 15, 1965. From October 19 to October 31, 1965, IBT campaign literature which had been mailed to approximately 1600 listed employees was returned by the post office as being undeliverable. The IBT delivered the returned envelopes to Mediator Pierce for the purpose of obtaining correct names and addresses from REA so that the IBT might have an opportunity to communicate with these employees by mail before they received their ballots. As of October 29, 1965, the IBT had not received the corrected names and addresses of these 1600 employees from Mediator Pierce (R. 153-154, 161).

On October 28, 1965, Mediator Pierce notified the IBT that REA had omitted from the list an additional 1100 names and addresses of eligible employees, and he delivered this second supplemental list to the IBT on that date (R. 154, 161-162).

In the course of campaigning, representatives of the IBT reported that they had encountered numerous employees of REA whose names did not appear on any of the foregoing lists. In addition, they came across persons who were normally retired from the service of REA and who were not disabled, whose names appeared on the list of eligible employees even though they were not eligible to vote under the existing rules of the National Mediation Board (R. 154, 162).

On the basis of the foregoing, the IBT protested to Mediator Pierce that it had not had an effective opportunity to verify the lists which he had supplied, that the lists contained gross inaccuracies and that the IBT had been denied an adequate opportunity to campaign effectively in light of the discrepancies and shortcomings of the lists and the short time period allowed for campaigning. In response, Mediator Pierce advised the IBT that he was acting upon the instructions of the National Mediation Board and was without discretion to postpone the mailing of ballots to the listed employees (R. 154, 162).

On October 31, 1965, Mediator Pierce began to mail ballots to the employees. The ballots were returnable immediately but not later than 10 a. m., December 1, 1965 (R. 154).

On December 1, 1965, Mediator Pierce began the tally of returned ballots. He completed his count on December 5, 1965. The results of the election were as follows:

Employees eligible to vote	35,560
Voting for BRC	17,867
Voting for IBT	10,192
Void ballots	261

(R. 165)

On December 10, 1965, the NMB issued its certification to the BRC (R. 158, 166, 181, 212).

B. Court Proceedings.

Petitioners, the IBT and George Leonidas, an employee of REA and an IBT representative, filed their complaint in the District Court for the District of Columbia in this proceeding on October 13, 1965, together with a motion for preliminary injunction seeking a stay of the election *pendente lite*. The complaint alleged, *inter alia*, that the Board acted arbitrarily and beyond its power in directing an election on a systemwide basis contrary to a pattern of bargaining that had been established for forty years and formalized in existing agreements, and the stay was sought on the foregoing grounds plus the contention that the Board had acted unconstitutionally in denying petitioners sufficient time in which to communicate with REA employees for election purposes. Upon motion and consent order filed October 18, 1965, the BRC was permitted to intervene as a party defendant (R. 74-80). On October 25, 1965, the District Court denied the motion for preliminary injunction (R. 144). Petitioners appealed to the Court of Appeals for the District of Columbia Circuit from that denial and filed a motion for a stay of the election pending appeal. On October 29, 1965, that Court denied the motion for stay, Judge Wright dissenting. The Order and Opinion of that Court denying the motion for stay is attached hereto as "Appendix C". Application to this Court for stay was denied by Chief Justice Warren on October 30, 1965.

On October 19, 1965, the BRC filed a motion to dismiss petitioners' complaint or for summary judgment (R. 109).

Petitioners filed a cross-motion for summary judgment on December 21, 1965 (R. 145). Respondents filed their opposition to petitioners' cross-motion for summary judgment as well as their own motion to dismiss or for summary judgment on January 10, 1966 (R. 207). The BRC filed its opposition to petitioners' cross-motion for summary judgment on January 10, 1966 (R. 184). On January 18, 1966, Petitioners answered the motions to dismiss or for summary judgment filed by both the respondents (R. 215).

After hearing argument on the foregoing motions, Judge Oliver Gasch issued an Order, signed February 4, 1966, and filed February 7, 1966, granting the motions for summary judgment of the respondents and denying the motion for summary judgment of the petitioners (R. 217).

The case was duly appealed to the United States Court of Appeals for the District of Columbia Circuit and on May 31, 1966 that Court issued its decision and judgment affirming such order. The Court disposed of petitioners' contentions on the ground that judicial review of National Mediation Board proceedings is limited and concluded that

> "The proceedings were pending for some months and we cannot say on the record before us that the Teamsters were so severely deprived of campaign opportunities—matters largely intangible—that we are required to hold, contrary to the judgment of the Board, that constitutionally protected rights were infringed."

The decision is attached hereto as Appendix "A".

REASONS FOR GRANTING WRIT.

This case presents a question of importance in the administration of the Railway Labor Act. Under that Act the National Mediation Board, pursuant to its established

policy, conducts representation elections solely on a systemwide or a companywide unit basis in which thousands of employees are or may be involved, and who may be employed in many places of employment throughout the country. The Board has no rules or standards under which unions involved in such elections are given an opportunity to campaign.[2]

There has been no definitive expression by this Court or any court, other than the perfunctory opinion of the Court of Appeals in the instant case, setting forth the nature and extent of the constitutional rights of the unions and employees involved in such systemwide elections to communicate with other employees in the course of an election campaign, or concerning the extent to which the National Mediation Board or other administrative agencies, exercising the function of resolving disputes over representation, may restrict or limit effective exercise of this right to communicate with employees concerning the benefits or advantages of choosing one rather than another union as a bargaining representative.

The instant case, involving as it does some 35,000 employees employed by the country's largest express company in some 8,000 locations throughout the United States,

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[2] While the Railway Labor Act (Section 2, Ninth) requires that the Board certify to the parties involved in the election within 30 days of the invocation of its services the name of the organization that has been designated to represent the employees involved, it is well settled that this 30-day provision is "directory rather than mandatory." System Federation No. 40 v. Virginia Ry. Co., 11 F. Supp. 621 (D. C. Va. 1935), affirmed, 84 F. 2d 641 (C. A. 4), affirmed, 300 U. S. 515. The Board has acknowledged that the 30-day proviso is only directory. See National Mediation Board, **Administration of the Railway Labor Act by the National Mediation Board,** 1934-1957, p. 49 (1958). As a matter of practice it can be demonstrated that frequently the time lapse very substantially exceeds the 30-day interval provided in the statute as well as the 262-day period which elapsed in the instant proceedings.

is of national significance. The case brings into issue the right of communication of each of such employees as well as the right of the labor organizations that seek to represent them. Decision by this Court will serve not only to correct what the petitioners contend is a grave abuse of such rights but will also serve to establish guidelines for proper recognition of such rights in future elections which may be conducted by the National Mediation Board or similar administrative bodies.

In the courts below it was acknowledged that labor unions as well as employees involved in disputes over representation have a constitutional right to communicate with other employees in order to persuade them to select a particular union as their collective bargaining representative. **Staub v. City of Baxley**, 355 U. S. 313 (1958); **Thomas v. Collins**, 323 U. S. 516 (1945). Concomitant is the equally undeniable proposition that this right necessarily must be permitted to be exercised in an **effective** and practical manner. In **Thornhill v. Alabama**, 310 U. S. 88 (1940), an "anti-picketing" statute was struck down precisely because its prohibition embraced "nearly every **practicable, effective means** whereby those interested—including the employees directly affected—may enlighten the public on the nature and cause of a labor dispute," 310 U. S. 88, 104. (Emphasis supplied.) Neither a state nor the Federal Government "may impair the **effective** exercise of the right to **discuss freely** industrial relations which are matters of public concern." 310 U. S. 88, 104. (Emphasis supplied.)

It is well recognized by experts and students in the field that to be effective a large scale election campaign cannot be severely limited as to time or media of communications. The use of letters, leaflets, speeches, radio and television and, above all, personal contacts, in varying combinations and degrees, as by house to house visits and the holding of meetings, is essential in an election

contest of the magnitude and geographic dispersion such as the one involved herein.[3]

In the instant case petitioner union and the individual employees who wished to give their support were given no effective opportunity to persuade the employees involved in the election to choose IBT rather than BRC as their collective bargaining representative. The 35,000 employees who must be reached were scattered throughout the country in 8,000 different places of employment, in 85% of which less than 25 employees were employed. For about 40 years BRC had close contact with 32,000 of them; petitioner union had contact with only 3,200 for the same period. Under its union shop agreement and the mailing lists under which it distributed its periodicals, the BRC had a substantial initial advantage in the election which the Board failed to take into account—as it could have by affording IBT at least a reasonable time in which to communicate with the 32,000 employees with whom it had no previous contact. The National Mediation Board announced the date of the election only three weeks before it was to be held and provided its customary mailing list to the unions involved only 15 days before the election.

In view of the number of employees involved and their scattered places of employment, the importance of mailing lists is obvious. Vital as opportunity for personal communication through home visits or the holding of meetings is, at the very least opportunity should have been afforded for dissemination of campaign literature by mail as the only practical means of reaching the em-

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[3] See, **S & H Grossinger's Inc.**, 156 NLRB No. 20, 61 LRRM 1025, 1028-29. See, also, Eldersveld and Dodge, **"Personal Contact or Mail Propaganda: an Experiment in Voting and Attitude Change"**, in Katz, **Public Opinion and Propaganda**, 532, 541 (1954); Karsh, **Diary of a Strike**, 106 (1958); Klapper, **The Effects of Mass Media**, pt. 2, pp. 9-14 (1949).

ployees in the limited time given if the right of communication is to be other than an empty gesture, particularly where some 4,000 of the employees involved were furloughed, disabled or retired employees who could be reached only at their home addresses.[4]

Even the original mailing list furnished by the Board was grossly inadequate, as shown by the fact that by October 31, 1965, 1600 letters sent by petitioner union in reliance on the original lists were returned as "undeliverable" and by the fact that the Board was obliged to provide an additional list of 900 names and addresses eight days before the election and a list of 1100 more only two days before the election.

On the undisputed facts petitioner union had only two days to reach, even by mail, 1100 employees, only eight days to reach 900 employees, and no opportunity to reach the 1200 employees whose addresses were incorrect. Opportunity to make home visits and to hold meetings, the most important aspect of any election campaign (see footnote 3), was negligible.

Petitioners are not suggesting that the Constitution requires the Board to afford the IBT sufficient time in which to visit the homes of each of the 35,000 employees involved. What constitutes free expression on the one hand, or reasonable restraint on the other, must depend on the facts of each case. Petitioners submit, however,

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[4] It is no answer to say that petitioners had since March 23, 1965, when the BRC filed its petition for an election, in which to campaign. Serious issues as to whether any election would be conducted had been raised, including the 40-year prior history of bargaining and the existence of the current agreement between the unions and the company allocating respective representation rights. Certainly petitioners cannot be required to assume that they would be forced into an election and thus be put under obligation to commence their campaigning prior to the time the Board announced whether or not an election would be held.

that the form and degree of "discussion" permitted in this case cannot be deemed "practicable," "effective," or "free."

The court below bowed to the judgment of the Board that constitutionally protected rights were not infringed, relying on **Switchmen's Union v. National Mediation Board**, 320 U. S. 297; **Railway Clerks v. Employees Ass'n.**, 380 U. S. 650; and **Flight Engineers' International Assn. v. National Mediation Board**, 119 U. S. App. D. C. 171, 338 F. 2d 280, which affirm the broad scope of Board power in administering the Railway Labor Act. But administrative discretion, however broad, is not unbridled where constitutional rights are involved. **Kent v. Dulles**, 357 U. S. 116, at 129; **Greene v. McElroy**, 360 U. S. 474, at 507.

It is not controverted, as indeed it cannot be in the realities of modern industrial relationships, that unions and their supporters have a constitutional right protected by the First and Fifth Amendments to attempt through all available media of communications, and in a practical and effective manner to persuade employees involved in a contest over rights of representation to select one rather than another labor organization as their bargaining representative. Such right of communication simply was not afforded petitioners in the instant case, with the result, noted by Judge Wright dissenting from the opinion of the court below denying application for stay, that "the outcome of the election [was] a foregone conclusion." Whatever discretion the National Mediation Board may have in administering the Act, it had no discretion to deny or curtail the exercise of constitutional rights. Unless this Court intervenes, this or another administrative body whose function it is to resolve representation disputes may well deprive participants in a union election of the right to inform and to be informed concerning the issues and the merits of the respective candidates. Assuredly the Con-

stitution requires that effective opportunity for enlightment in an area as important to the national economy as choice of bargaining representative not be denied by governmental agencies charged with the responsibility of determining that choice.

CONCLUSION.

For the reasons stated, this petition should be granted.

Respectfully submitted,

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